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No. 80-89

In the
# Supreme Court of the United States
OCTOBER TERM, 1980

LEAK REPAIRS, INC.,
*Petitioner,*
*vs.*
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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LEAK REPAIRS, INC.,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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Leak Repairs, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The Seventh Circuit Court of Appeals enforced an order of the National Labor Relations Board, in an order reproduced in the Appendix, and not otherwise reported. The National Labor Relations Board's decision and order, adopting the decision of an administrative law judge, will be reported at 241 NLRB No. 38. It and the administrative law judge's decision is reproduced in the Appendix.

## JURISDICTION

The Seventh Circuit Court of Appeals issued its order on May 21, 1980. This petition is brought within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

(1) If cause and anti-union animus both exist where an employer discharges an employee, may the National Labor Relations Board (and the Courts of Appeals) decide that the discharge violates section 8(a)(3) of the National Labor Relations Act, without inquiry into whether the employee would have been retained "but for" the misconduct creating "cause"?

(2) Whether this Court's rationale in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977), applies under section 8(a)(3) of the National Labor Relations Act, to determinations of employer motive for discharging an employee?

## STATUTE INVOLVED

The National Labor Relations Act, 29 U.S.C. §§151 *et seq.*. provides in section 8(a)(3), 29 U.S.C. §158(a)(3):

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

and in section 10(c), 29 U.S.C. §160(c):

> . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 10(f), 29 U.S.C. §160(f) provides:

> Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, * * * *

## STATEMENT OF THE CASE

The Board's order reinstating two discharged employees, enforced by the United States Court of Appeals for the Seventh Circuit, was based on a finding of violation of §§(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (3) ("the Act"). The Court of Appeals had jurisdiction to enforce the order of the Board under section 10(e) of the Act, 29 U.S.C. §160(e). No challenge was raised to the §8(a)(1) finding before the Seventh Circuit, nor is any raised here.

The circumstances behind the §8(a)(3) finding involved a situation sometimes referred to as "mixed motive" discharges; *i.e.*, two employees who were union advocates were also, admittedly, guilty of misconduct and were discharged. The company was opposed to unionization.

Leak Repairs is engaged in a new business, repair of leaks in steam and chemical systems and piping while the systems are functioning. This work requires minutely precise measurements of the affected pipe. The employees intentionally misrepresented the critical measurement of a gap between flanges in sections of a pressurized steam pipe for which a special sealing clamp was to be designed and manufactured. The clamp thus did not fit, the repair was not effected, and an expensive fixture was wasted. The administrative law judge found

that the employees had "made a mistake at the ECI job," that, whereas the employees had been instructed by management to fill out the data sheet forms accurately, they failed in not "sufficiently and clearly apprising their superiors of their improvisation" in under-reporting the width of the gap as 3.50 inches although they had measured it at 3.80 inches. (Report of administrative law judge, Appendix at 15a, 23a).

The administrative law judge also found that these two employees had been active in propagandizing for a union and concluded "that Respondent, in summarily firing employees Jenkins and Paver on June 13, 1977, was motivated at least in part by their union and related protected concerted activities." (21a *infra*) Because the administrative law judge believed that "a discharge motivated only in part by an unlawful purpose is similarly illegal," (Appendix at 21a), he concluded that the terminations here violated the Act.[1]

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[1] The administrative law judge, and the Seventh Circuit on review, both announced the standard that even partial anti-union animus sufficed to constitute a §8(a)(3) violation. However, each found that the "real reason" for the discharges here was the anti-union animus; and that the "for cause" reason was merely seized upon. But neither the Board nor the Court of Appeals analyzed the fact situation to determine if the employees would have been retained "but for" the anti-union considerations. The Seventh Circuit observed that it had never endorsed a "but for" test, and refused to apply such analysis here. Appendix at 30a. The conclusion that forbidden motives constituted the "real reason" for the discharge, therefore, was reached solely in the announced context that *any* anti-union animus would be enough to condemn the employer's action.

*Givhan* v. *Western Line Consol. School Dist.*, 439 U.S. 410 (1979), represented a closely analogous situation, where a "but for" test was appropriate but was not

The Seventh Circuit here concluded

> It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation."

Appendix at 33a. That may be translated to read, "It is a mistake to lie to your superior about an important commercial matter without sufficiently and clearly telling him you are lying." The Court went on to hold that "the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by anti-union considerations." Appendix at 30a.[2] The

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([1] Continued)
applied. Even though the trial court had found that an unconstitutional factor was the "primary" reason for a decision not to rehire an employee, this Court remanded for a new fact determination under the appropriate 'but for" analysis. 439 U.S. at 417.

As the First Circuit has observed, "the Board all too often has either disregarded altogether the valid reasons for the employers' conduct, or has labeled the good reason pretextual, although it was apparent that it was a good reason of substance." *NLRB* v. *Eastern Smelting & Refining Corp.,* 598 F.2d 666, 671 (1st Cir. 1979).

[2] The full statement reads "Respondent concedes that the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by anti-union considerations." Respondent sent a letter to the Court, following oral argument and before decision, explicitly contending that the correct standard was a "but for" test, rather than the "even in part" test,, in view of this Court's opinion in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Petitioner has no explanation for why the Seventh Circuit stated that petitioner had conceded.
Respondent maintains that anti-union animus played no part whatsoever in the decision to terminate these employees, even though that was not the finding of the administrative law judge.

Seventh Circuit affirmed the finding that anti-union considerations were, indeed involved, and thus enforced the Board's order.

Petitioner has been cited for a violation of §8(a)(3) because the administrative law judge found that one of the employer's motives for discharging two employees was their union activities. However, the employees, according to the Board's own findings, had intentionally and seriously erred on the job. No administrative law judge, board, or court has ascertained whether the employees here involved would have been retained *but for* their union activities.

## REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit is in direct conflict with decisions of the First, Second, Fourth and Eighth Circuits, which hold that the principle enunciated by the Court in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), (a First Amendment case), and noted in *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 270 n.21 (1977) (a Fourteenth Amendment and Fair Housing Act case), that mere engaging in protected activity by an employee will not vitiate the employer's right to dismiss an employee who, absent the protected activity, still would have been dismissed lest such an employee be placed "in a better position as a result of constitutionally protected conduct than he would have occupied had he done nothing." (429 U.S. at 285)

### I. CONFLICT AMONG THE CIRCUITS

Had the case been in the First, Second, Fourth, or Eighth Circuit, a different standard would have been applied in adjudging the discharges. Those circuits require the Board to demonstrate that an employee would not have been discharged *but for* his union activities.

The contrast with the Seventh Circuit's position could not be more stark:

> Respondent contends, however, that a legitimate reason existed for their discharges—their failure to report the accurate measurements for the refinery leak. Consequently, it argues the burden rests with the Board to establish that the discharges would not have resulted from that purportedly legitimate basis alone. This Court has never endorsed such a "but for" test, Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1034 (7th Cir. 1980), and we

find the cases cited by respondent in support of such a standard to be inapposite.

Here is how the First Circuit set forth the test for "mixed-motive" firings in *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670-671 (1979):

> The employer always asserts a good motive and the Board a bad one, and the division is not so simplistic. We envisage a greater number of possibilities.
>
> • • •
>
> Even if the Board can meet its burden of demonstrating improper motivation, the matter does not end there. The employer may still defend by proving that there was a good reason for the discharge and that "it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274.

In its cited case, *Chicago Magnesium Castings*, the Seventh Circuit recognized the First Circuit's opinion in *Eastern Smelting* as expressive of the "but for" test *that the Seventh Circuit was rejecting.*

The Seventh Circuit dismissed petitioner's citation of *Mt. Healthy* and *Eastern Smelting* as "inapposite," and ruled that *any* improper motivation on the employer's part was enough to constitute a §8(a)(3) violation or, as it put it a few months earlier in *Chicago Magnesium Castings*, "[T]he Company's obviously *tainted* motive *vitiated* any legal grounds it might otherwise have had." (612 F.2d at 1034, Emphasis supplied) Although the decision at bar is not to be published, *Chicago Magnesium* has been published and will govern in the Seventh Circuit. The decision at bar shows how implacably the Seventh Circuit will apply its *Chicago Magnesium* doctrine.

In the Second Circuit, the "but for" test is also the rule. In 1978, citing *Mt. Healthy*, that circuit announced

> [W]here the employer was motivated by both valid and invalid reasons, a rule of causation is indispensable. . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the "but for" cause of the discharge.

*Waterbury Community Antenna, Inc.* v. *NLRB,* 587 F.2d 90, 98 (2nd Cir. 1978). This is the same "but for" test that the First Circuit enforces, and the Seventh Circuit has "never adopted."[3]

Again, in the Fourth Circuit, the rule is that causation in a "but for" sense must be proved. The mere coexistence of an improper motive is not enough.

> [A]n unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity.

*Neptune Water Meter Co.* v. *NLRB,* 551 F.2d 568, 570 (4th Cir. 1977).

And in the Eighth Circuit, the rule is the same, with the court relying upon the Fourth Circuit's formulation. *See Keokuk Gas Service Co.* v. *NLRB,* 580 F.2d 328, 335 (8th Cir. 1978), *citing Neptune Water Meter Co.*

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[3] The administrative law judge in this case relied upon a much earlier Second Circuit case, J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2nd Cir.), *cert. denied,* 389 U.S. 1005 (1967), for the rule that "a discharge motivated only in part by an unlawful purpose is similarly illegal". His opinion reflects no awareness of the later Second Circuit position.

The Ninth Circuit has explicitly rejected the formulation used by the Seventh Circuit, that any decision "in part" motivated by anti-union animus is illegal. *Western Exterminator Co.* v. *NLRB,* 565 F.2d 1114, 1119 (9th Cir. 1977). However, it has not explicitly accepted the "but for" formulation adopted by the First, Second, Fourth and Eighth Circuits.

The Fifth Circuit has ruled that "[H]aving anti-union animus by itself does not violate section 8(a)(3)" and "Once the employer established just cause, the burden then shifted to General Counsel to prove that the employer's anti-union animus was the motivating factor. . . ." *NLRB* v. *Collier,* 553 F.2d 425, 428 (5th Cir. 1977); *Delco-Remy Division, General Motors Corporation* v. *NLRB,* 596 F.2d 1295, 1305 (5th Cir. 1979); but *see NLRB* v. *Big Three Industrial Gas & Equipment Co.,* 579 F.2d 304 (1978) which seems to pose a balancing test. The Fifth Circuit cases seem unclear and that Circuit has not announced that the "but for" test is the appropriate means of ascertaining what the motivating factor actually was.[4]

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[4] The Third Circuit has in a single opinion expressed a rule reflecting elements of both the "but for" and the "in part" tests, without any recognition of inconsistency. *See Edgewood Nursing Center, Inc.* v. *NLRB,* 581 F.2d 363, 368 (3rd Cir. 1978).

In the District of Columbia Circuit, one panel has announced the "but for" test in §8(a)(3) cases, "In order to establish a section 8(a)(3) violation the Board must find that the employee would not have been discharged but for his union activity." *Midwest Regional Joint Board, Amalgamated Clothing Workers of America* v. *NLRB,* 183 U.S. App. D.C. 413, 564 F.2d 434, 440 (1977). *Another* panel has applied a test closer to the Seventh Circuit's, "A discharge is unlawful if motivated even in part by anti-union animus. . .," *Allen* v. *NLRB,* 183 U.S. App. D.C. 83, 561 F.2d 976, 982

On the other side of the conflict, the Tenth Circuit supports the Seventh Circuit's approach, that *any* anti-union animus involved in an employment decision renders the decision vulnerable under §8(a)(3). "Discrimination need be but a partial motive for a discharge in order to be violative." *NLRB* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977). *See also Head Division, AMF, Inc.* v. *NLRB*, 593 F.2d 972, 975 (10th Cir. 1979).[5]

A conflict among the circuit courts of appeals has traditionally been strong reason for the Court to grant *certiorari* and is one of the stated reasons therefore in the Court's Rule 17. The conflict here is direct and pervasive on a section of the nation's basic labor law under which cases are constantly arising. Every circuit has expressed itself. The Sixth, Seventh and Tenth Circuits support the rule that *any* anti-union animus will *vitiate* an employer's otherwise valid action. The First, Second, Fourth, Eighth and Ninth Circuits have rejected this view. Of these, all but the Ninth apply the alternative rule that anti-union animus will condemn an employer's action only if the employee would otherwise not have been disciplined. The Third and Fifth Circuits have

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([4] Continued)
(1977). And a third panel has held that the test is to ascertain the "real reason," without stating whether the "but for" test is the appropriate way of determining the "real reason." *District 65, Distributive Workers of America* v. *NLRB*, 193 U.S. App. D.C. 1, 593 F.2d 1155, 1166 (1978). There has been no *en banc* opinion to arrive at a single expression of the rule in the District of Columbia Circuit..

[5] The Sixth Circuit appears to follow the same rule, but has only expressed itself in the context of §8(a)(1), not a §8(a)(3) charge. *See NLRB* v. *Elias Brothers Restaurants*, 496 F.2d 1165, 1167 (6th Cir. 1974).

expressed a test in terms of finding the *real* reason behind an employer action. And different panels of the District of Columbia Circuit have held each of these positions.

This sharp conflict is more than dialectical. The opposing theories well may lead to different decisions in identical fact settings. In the Seventh Circuit the guarantee of Section 10(c) of the Act (29 USC §160(c)) that an employer may discharge any employee, union adherent or otherwise, "for cause" has been negated. Mere existence of anti-union animus will contaminate a separation. However, the First Circuit made it clear in *Eastern Smelting* that the members of the court "will adhere to our promise" not to "rescue [the Board] if it does not both articulate and apply our [but for] rule". (598 F.2d at 671-2) The Seventh Circuit dismisses *Eastern Smelting* as "inapposite" and adheres to its own vague rule of which the Board took advantage here. (Contrary *Eastern Smelting* is; inapposite it certainly is not.) The other circuits that have faced the issue seem equally firm in their positions.

It is predictable that if the matter not be settled, sophisticated multi-state employers will utilize the liberal appeal venue provisions of the Act to bring their petitions to set aside believed improper Board orders in the First, Second, Fourth or Eighth Circuits if they be incorporated or maintain their principal place of activity in one of the states within those circuits, even though the alleged unfair labor practice occurred in Sixth, Seventh or Tenth Circuits. While such conduct may be derided as forum shopping, the fact remains that any lawyer true to his duty to protect his client's interest by all lawful means, will advise his client to take ad-

vantage of the Act's venue provisions and seek a circuit following the "but for" rule.

Section 8(a)(3) is the most frequently used unfair labor practice section of the Act.[6] As things now stand, it is impossible for the National Labor Relations Board to apply that section of the law consistently throughout the country. Yet the Board has not sought *certiorari* from any decision applying the "but for" test. Employers should not have to endure the present unseemly and stubborn controversy among those courts. The Court can settle the controversy and furnish binding guidance to administrative law judges, the Board, the courts of appeal and bewildered employers. In the interest of fair administration of the Act the Board should join in Petitioner's request for the writ.

## II. THE APPLICABILITY OF MT. HEALTHY

The problem of motivation with respect to hire or tenure of employment is not new[7] nor is it any longer

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[6] Tables 2 to the *Annual Reports* of the *National Labor Relations Board* for 1977, 1978 and 1979 show that charges filed against employers under Section 8(a)(1)(3) constituted 50.56%, 49.7% and 46.6% respectively, of total unfair labor practice charges against employers in those years.

[7] *See, e.g.*, A. Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv. L. Rev. 1 (1947); *Note, Proving an* 8(a)(3) *Violation, the Changing Standard*, 114 Penn. L. Rev. 866 (1966);
T. Christensen & A. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269 (1968);
M. Shieber & S. Moore, *Section* 8(a)(3) *of the National Labor Relations Act: A Rationale—Part II, Encouragement or Discouragement of Membership in Any Labor Organization and the Significance of Employer Motive*, 33 La.L.Rev. 1 (1972);

limited to Labor Act cases. The Wagner Act (1935) provided that discrimination in employment, to be illegal under the Labor Act, must be practiced "to" discourage unionization. The 1947 Taft-Hartley Amendment did not change this, although it inserted in section 10(c) the guaranty of the right to discharge for cause. In 1951 the Court, in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, recognized that in 1947 Congress "expressed disapproval of the manner in which the courts were applying their own standard [of review]." (340 U.S. at 483-84) Since *Universal Camera* was decided, other statutes prohibiting employment discrimination for reasons of race or sex have come into existence and constitutional liberties exercised under the First Amendment have been given greater protection. The problem in all these cases is essentially the same—was employment denied or interfered with for an illicit or for a proper reason? So far as the Labor Board goes the concerns for thorough review are eroding in some circuits and, as here, courts of appeal are permitting the Board from undisputed facts to draw fanciful conclusions that are obnoxious to common sense.

In *Mt. Healthy, supra,* a school board's determination not to rehire a teacher had been overturned by a court because a "substantial part" of the school board's decision was premised on the teacher's exercise of First Amendment rights. This Court vacated and remanded for a determination of

> whether the [School] Board had shown by a preponderance of the evidence that it would have reached

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(7 Continued)

*Comment, Employer Discrimination Under Section* 8(a)(3), 5 U. Tol. L. Rev. 722, 765 (1974) ("In attempting to clarify or identify predominating reasons or motives behind employer actions where there may be some legal and some illegal motives, the courts have developed a 'but for' test.")

> the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287.

*Mt. Healthy* was cited to the Seventh Circuit which in its per curiam, unpublished opinion, dismissed *Mt. Healthy* as "inapposite".

The question thus is whether the same formulation ought to apply to employees asserting statutory rights as is applied to employees asserting federal constitutional rights. The Court explained the logic of its rule in *Mt. Healthy,* and criticized the trial court's rule that any "substantial" reliance on an impermissible motive would taint the employment decision:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

429 U.S.at 285.

The Second Circuit has followed this identical reasoning in the context of an employee asserting national labor law rights:

> Without a "but for" test, we "could place an employee in a better position as a result of" his organizational efforts "than he would have occupied had he done nothing."

*Waterbury Community Antenna, Inc., supra* 587 F.2d at 99.

The Second Circuit concluded, "[I]t is doubtful whether a test which is adequate to protect First Amendment rights would prove inadequate to protect organizational rights." *Id.*

The First Circuit also premised its "but for" causation test on *Mt. Halthy,* and recognized that a test formulated in the context of First Amendment rights was more than adequately protective of an employee's organizational rights.

> The Board has never mentioned *Mt. Healthy,* let alone explained why it should be thought less serious to violate the First Amendment than the Labor Act. *Mt. Healthy* and *Givhan* v. *Western Line Consol. School Dist.* . . . , are not labor cases, but involved the discharge of teachers by school boards assertedly because they had engaged in constitutionally protected speech. As we pointed out in *Coletti's Furniture, Inc.* v. *NLRB,* 1 Cir. 1977, 550 F.2d 1292, 1293, the principle is the same.

*NLRB* v. *Eastern Smelting & Refining Co., supra,* 598 F.2d at 671 & n. 10.

The First Circuit has applied *Mt. Healthy* in a series of labor cases, but the National Labor Relations Board has not sought *certiorari* in any of them.[8]

The Board is aware of this conflict, and employees of the Board have admitted in public comment that the difference between the "in part" and "but for" tests must be resolved by this Court.[9] It apparently is the Board's

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[8] *Coletti's Furniture, Inc.* v. *NLRB,* 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Rich's of Plymouth, Inc.,* 578 F.2d 880 (1st Cir. 1978); *Hubbard Regional Hospital* v. *NLRB,* 579 F.2d 1251 (1st Cir. 1978); *Liberty Mutual Ins. Co.* v. *NLRB,* 592 F.2d 595 (1979); *NLRB* v. *Eastern Smelting and Refining Corp.,* 598 F.2d 666 (1st Cir. 1979); *Texas Instruments, Inc.* v. *NLRB,* 599 F.2d 1067, 1073 (1st Cir. 1979); *NLRB* v. *Wilson Freight Co.,* 604 F.2d 712, 721 (1st Cir. 1979), *c.d. sub nom; Smith* v. *Wilson Freight Co.* on different §8(a)(4) question, April 14, 1980, 48 L.W. 3659.

[9] See Remarks of Robert E. Allen, Director, NLRB Office of Appeals, in 30 Daily Labor Report A-4 (Feb. 12, 1980).

view that *Mt. Healthy* does not apply to labor cases.[10] Yet the Board, thus far, has not so much as discussed *Mt. Healthy* in a Section 8(a)(3) context and explained its position.

The "but for" test of causality applies to Title VII (42 U.S.C. §2000e *et seq.*) cases as well. The Court held, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976) that the appropriate standard of proof required a showing "that race was a 'but for' cause" of disparate treatment. Citing *Mt. Healthy,* in a failure-to-hire Title VII case, this Court held, "even assuming, *argeundo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, 404 (1977). *See also International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 368 (1977); *cf, Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 271 n.21.

The absence of any expressed rationale for not applying the *Mt. Healthy* rule of causation to determinations of cause under the national labor laws, while that rule of causation applies to constitutionally protected and Title VII rights, is mirrored by the absurdity of two different rules co-existing in a single workplace. Suppose two employees engage in the same business-related error meriting discharge. One is a union advocate. The other is a black man. Both are discharged. Although the employer is motivated, in part, by his antipathy toward unions in the one case and by racial bigotry in the other, both employees would still have been discharged anyway.

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[10] *Id.*

The black man's firing is legal; but the union advocate's, under the Seventh Circuit rule, is not, even though Section 10(*c*) of the Labor Act supposedly guarantees the right to discharge for cause.

The intervention of this Court is required to set a single coherent rule for resolving causation questions in the employment context. There should not be one rule for union organizational rights, and a different rule for equal employment opportunity and federal constitutional rights.

Whether we be correct in our belief that the "but for" test should be applied to Labor Board cases is not, for the moment, important. What is important at this point is that an irreconcilable conflict between important circuits exists that prevents uniform application of basic labor law throughout the country. We respectfully suggest this Court should bring an end to this chaos.

• • • •

Petitioner prays that the writ of *certiorari* issue.

Respectfully submitted,

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JULY 16, 1980

# APPENDIX

241 NLRB No. 38

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEAK REPAIRS, INC.

and

MILTON LOUIS JENKINS AND VINCENT LAWRENCE PAVER

D—4831

Chicago, Ill.

Case 13—CA—16838

## DECISION AND ORDER

On November 24, 1978, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and supporting argument and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Leak Repairs, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. March 20, 1979

.....
John H. Fanning, Chairman

.....
John A. Penello, Member

.....
John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges
JD—783—78
Chicago, IL
Case 13—CA—16838

LEAK REPAIRS, INC.

and

MILTON LOUIS JENKINS
An Individual

VINCENT LAWRENCE PAVER
An Individual

*William G. Kocol* and
*Bruce G. Conley, Esqs.*,
for General Counsel.
*Michael B. Erp, Esq.*,
for Charging Party.
*Fred H. Daugherty, Esq.*,
for Respondent.

## DECISION

FRANK H. ITKIN, Administrative Law Judge. This hearing was conducted in Chicago, Illinois, on February 23 and 24, 1978. The unfair labor practice charge was filed on September 13, 1977. The complaint issued on November 9, 1977, and was later amended at the hearing. The principal issue presented is whether Respondent Company violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening employees with layoff, plant closure and other reprisals if they chose union representation and, further, by discharging employees Milton Louis Jenkins and Vincent Lawrence Paver because of their union and related protected concerted activities. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following findings of fact and conclusions of law:[1]

### Findings Of Fact

Respondent Company maintains facilities in Alvin, Texas, and in Alsip, Illinois. Respondent is engaged in the business of providing "on steam" repairs to leaking equipment and piping systems. During the prior calendar year, Respondent received goods and materials at Alsip valued in excess of $50,000 directly from outside of Il-

[1] General Counsel's motion to correct the transcript, dated April 5, 1978, which is unopposed, is granted.

linois. During this same period, Respondent rendered services from its Alsip facility valued in excess of $50,000 directly to enterprises outside of Illinois. I therefore find and conclude, as admitted, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### A. Employees Jenkins And Paver Attempt To Get Union Representation

Milton Louis Jenkins, a charging party, testified that he started his employment with Respondent Company at Alsip about February 12, 1977, as an assistant technician. About mid-April, Jenkins discussed the advantages of union representation with co-employee Vincent Lawrence Paver, also a charging party. Jenkins and Paver thereafter discussed this subject "almost on a daily basis" among themselves and with other employees. Jenkins also attempted, without success, to enlist the assistance of a labor organization, Pipefitters Local 729, in this organizational effort. As Jenkins testified:

> I told Paver that I had talked to Enright from the Pipefitters and that they didn't want to get involved in our situation. I told him that we ought to get the employees together for a meeting and make some type of list of gripes as such and try to set up a meeting with Texas [the central office of the Company].

Jenkins and Paver thereafter spoke with their fellow employees and arranged a breakfast meeting at the "Country Kitchen, right by the shop." This meeting was held during late May 1977, and was attended by Jenkins and Paver and some five co-workers of the Alsip facility. Jenkins, as he testified, "started the meeting out" with his "list" of topics and "gripes." The employees present added to this "list." Subjects such as wages, hospitalization, maternity benefits, pay-time, hours

of work, safety sessions and "the pros and cons of a union" were discussed. At the conclusion of the meeting, Jenkins "told the employees that [he] would approach Al Spencer [the Company's Alsip branch manager] with the list and try to set up a meeting with somebody at Texas."

On the following day, Jenkins spoke with branch manager Spencer in Spencer's office. Jenkins recalled:

> [I] told Mr. Spencer that the employees got together and we made a list of gripes. And we'd like to talk with the [Company's] representative from Texas about our gripes and about the shop going union.

Spencer "said that he would get in touch with Texas and get back with" the employees. Thereafter, Jenkins again spoke with Spencer about this subject at a "hot dog stand" near the Alsip facility. Employees Paver and Paul Durham and foreman Kenneth Leone were also present during this discussion. Jenkins testified:

> I asked Mr. Spencer, had he heard anything concerning Texas sending somebody down. He said he knew somebody was coming but he didn't know who. He said, "if you guys push this union thing, Texas will end up shutting this shop down and I will lose the $3,000 I have got down on a house I am having built." I told Mr. Spencer that Texas couldn't shut a shop down * * * for employees wanting to go union. He said, "it's a Texas shop, they can if they want."[2]

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[2] Jenkins recalled that on the following day he again asked Spencer in the shop, "had he heard from Texas." Spencer replied, "no * * *. I hope you guys know what you are doing. They will shut the shop down and I will lose the money I got down on my home." Jenkins recalled a similar conversation with Spencer later that evening or on the following day.

About this same time, Jenkins, Paver and some three co-workers attended an employees' meeting at the Alsip shop. The meeting had been "called" by Louis Randolph, the Company's superintendent. According to Jenkins,

> Randolph said, "I guess you know George Harrison [the Company's vice president] is coming up to meet with you guys." He said, "if you push this Union thing * * * Texas will shut this shop down."

About June 3, 1977, Company vice president Harrison spoke to the Alsip employees in the shop. Jenkins recalled that "Harrison came out, introduced himsef and said, I understand you guys got some gripes you'd like to discuss." Jenkins responded, "Yes, * * * I had a list * * * that we had gotten together and made up." Harrison asked for the "list" and instructed Spencer to prepare a copy of the "list." See General Counsel's Exhibit 7. Jenkins then "started the meeting out" by discussing with Harrison his "list." During this discussion, as Jenkins testified,

> * * * I [Jenkins] brought [up] concerning the union. I asked, "Could we have a representative from a union come in and talk to Mr. Spencer concerning benefits and see if we could work out some type of program or give the Company a better idea * * * what we could get by having a union." At this time, Mr. Harrison said, "No, [he] couldn't allow that. [He would] have to get back with the stockholders and bring it up to them." * * * Harrison said, "What good would a union be any way." I [Jenkins] said, "Well, it would give us job security. It would help the Company in getting into some plants that wouldn't allow us * * * because we are non-union and it would hopefully help us get better benefits."

Harrison claimed that "there is more to it than that." Jenkins asked: "If this shop went union, what would Texas do"? Harrison replied: "They'd probably shut it

down." The meeting ended with Jenkins asking Harrison "three questions to take back to the stockholders" pertaining to union representation and increased benefits.

Subsequently, about June 10, 1977, Company vice president Robert Thompson spoke to the Alsip employees in the shop. As Jenkins testified, "I started the meeting out asking Mr. Thompson about the three questions that I had sent with Mr. Harrison to get answers for." Thompson responded that he had been advised by "his lawyers in Texas" against "bringing * * * a representative from a union in to talk to Al Spencer. Further, Jenkins recalled:

> At that time, I [Jenkins] told Mr. Thompson * * *, "When Mr. Harrison was up here, he [Harrison] said that if this shop went union, Texas would shut the shop down." And Mr. Thompson said, "Don't get me [Thompson] wrong. I am not totally against a union, but if this shop did go union, you could see how it would not run efficiently as it should and, therefore, yes, we probably would have to shut it down."

Thompson then asked Jenkins "why you would want a union anyway" and Jenkins cited "job security" and "benefits."

Employee Paver testified that he was employed by the Company from June 1975 through June 1976 and from February 14, 1977 through June 13, 1977. Paver recalled discussing a union with co-worker Jenkins and other Alsip employees "almost everyday from April until the time we were fired in June." During late May, Paver assisted Jenkins in arranging a meeting of the employees, in order to "make up a list of demands and try to get another union or present our list to the Company." Paver later participated in the employee meeting at the Country Kitchen restaurant.

About this time, during late May, as Paver further testified, branch manager Spencer "came up" to Paver at

work and the two engaged in "just regular chit-chat and happened to bring up a point about the union." Paver then commented to Spencer: "If we could get a union, it would be nice." Paver asked Spencer "what he thought about it." Spencer replied:

> He [Spencer] said he couldn't say at this time. But he said, "If we got a union, Texas would probably close this shop down."

About a day later, Paver, in the presence of co-worker Jenkins, was complaining to Spencer about a particular job. Paver stated: "If we had a union, it would take better care of these problems." Spencer replied that "we'd get more problems." Spencer noted: "I have some money down on a house and I would hate to be transferred and lose my money."

Paver recalled a further conversation with Spencer at a "hot dog stand" near the shop. Jenkins and other employees were present. Paver overheard Spencer state:

> he [Spencer] had some money down on a house and he didn't want to lose it. If we kept pushing this union deal, they'd probably have to shut the shop down.

Paver also recalled a conversation with foreman Leone about this same time. Leone, after taking a telephone call, apprised Paver:

> They gave me [Leone] the word. If I was caught collaborating with you on the union, I lose my job. What you guys do now I want no part of and I want to keep my nose clean.

Paver attended a portion of Harrison's meeting with the employees on or about June 3, 1977. Paver also attended the Thompson meeting with the employees on or about June 10, 1977. Paver recalled that co-worker Jenkins had asked Thompson: "What happens, you know, if we went with the union." Thompson replied:

> This isn't a threat. I want to make that perfectly clear. But if you people insist no going with the union and you got a union, we'd probably have to close this shop down.

Anthony Gazelle, a technician employed at Respondent's Alsip operation, recalled the efforts of co-workers Jenkins and Paver to unionize the shop. Gazelle recalled that about late May or early June 1977, he and branch manager Spencer had the following conversation while playing golf:

> Al [Spencer] said to me, he says, "Texas knows about this union you guys have been talking about." I said, "no." He said, "Do you know what Texas will do." I said, "no, I don't." He says, "well, they will transfer all salaried people, lay everybody on hourly off and shut the office down." I says, "why would they do that." He says, "Texas doesn't want unionists in the Company."

Spencer also apprised Gazelle: "I'm just telling you what they said. I don't want to see you guys doing anything you'd be sorry for later." About one week later, Gazelle, as he further testified, was called into Spencer's office. Spencer informed Gazelle: "I'm talking to you as a friend, not as your boss. I don't want to see you get involved in this union thing. You've got a good chance to move up on the Company. I don't want to see you fuck it up * * *."[3]

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[3] Gazelle attended the meeting of employees conducted by vice president Harrison. Gazelle recalled, *inter alia*, that co-worker Jenkins asked Harrision, "what would Texas do if we get a union in here." Harrison responded: "We'd probably close the shop down." Gazelle also attended the meeting of employees conducted by vice president Thompson. Gazelle recalled that Jenkins had asked Thompson, "what would Texas do if we got a union in here." Thompson responded: " * * * he didn't see how this could operate if it was a union * * *."

Paul Durham, employed by the Company as an assistant and, later, as a technician from January until August 1977, recalled that foreman Leone told him and co-worker Paver that "he [Leone] no longer could talk to us about the union, that his job would be in jeopardy." Durham also witnessed branch manager Spencer warn the employees at a "hot dog stand" that,

> I [Spencer] have $3000 on a new house that I am having built * * * [and] if we keep continuing this union business that Texas is going to close the shop and I'll lose my $3000.

Durham later witnessed superintendent Randolph state to the Alsip employees, "Harrison wanted to know what we were going to do about the union business and that Texas would definitely close the shop if we continued it." In addition, Durham witnessed vice president Harrison explain to co-worker Jenkins that "Texas would shut the shop down" if the employees "went union."

Robert Thompson, vice president of Respondent, admittedly spoke with the Alsip employees on or about June 9, 1977. He had seen the employees' "list of complaints or gripes." This "list" was discussed at the meeting. Thompson recalled: "Milt Jenkins had told me they had been talking to a union representative." They then discussed "the pros and cons of a union." According to Thompson:

> I thought from a business climate basis and efficiency of operation that the business could quite possibly suffer if it was unionized. I spoke to that, that I felt this was a possibility, not using it as a threat, that I was concerned that the branch operation would survive as a union operation.

Company vice president Harrison recalled that he spoke to the Alsip employees about June 1 and that he then reviewed the "list" of employee complaints. Harrison generally denied, *inter alia,* that he was asked by Jenkins what would happen if the shop were "organized" and

that he responded "that the plant would close down or mentioned the plant closing in any way."

Branch manager Spencer generally denied, *inter alia,* that vice president Harrison had told the Alsip employees during his meeting that "he was going to close down the shop if it went union." In addition, Spencer recalled a conversation with employees at a "hot dog stand" at which time the "pros and cons" of unionization were discussed. Jenkins then said, "we have got nothing to lose" and Spencer admittedly responded: "I have got $3000 to lose because I was buying a new house. That is all I remember of that conversation." Spencer further recalled a conversation with employees Jenkins and Paver at which time he said: " * * * do you remember old John Popp [a former manager], what he wanted to do, he wanted a union, and they would probably shut this place down." Spencer next recalled talking with employee Gazelle "regarding a union" during a golf game. Spencer could only "remember saying" that "some of the guys are talking about it" and he, Spencer, "really didn't know" what the Company "will do."[4]

### B. The Company Discharges Employees Jenkins And Paver

Employee Jenkins testified that on Monday June 6, 1977, he and co-worker Paver went to the ECI refinery to investigate "a steam leak." The leak was on "a flange and heat exchanger" — the "exchanger was approximately 12 to 15 feet long * * *; it's like a large cylinder or pipe" and the "bottom is approximately three feet in

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[4] Superintendent Randolph was present when vice president Harrision addressed the Alsip employees. Randolph was asked if Harrison had said: "Texas would close down the shop * * *." Randolph's response was: "I don't remember him saying that" — "I never heard him say that." Randolph generally denied telling the employees that the Company was going to close the shop if it went union.

diameter." Jenkins was the assistant technician assigned to this job. Paver was the technician. Jenkins recalled that Paver examined the leak and noted that "there is a weld down here on this flange" and if "we went with a tongue seal [a common form of clamp used to stop such a leak] it could cause us problems." Consequently, Paver wanted to "use packing instead" as a seal. Paver determined that,

> if we went with packing, we could go on the outside of the weld and we could have a 360 [degree] seal on both flanges all the way around. And, we will keep the tongue, except we'll take off a quarter of an inch off the measurement or thereabouts. And we will just use the tongue for taking up space.

Jenkins agreed with Paver. The two employees then made their measurements and filled out a Company data sheet. See General Counsel's Exhibit 8. Jenkins acknowledged that, in filling out the data sheet (General Counsel's Exhibit 8), the employees recorded the "gap between the head of the flanges" as 3.5 inches although the "exact measurement" of this gap was approximately 3.75 inches. Paver then "took the data sheet and called the information into Texas," where the Company would prepare the clamp.

A few days later, Jenkins apprised foreman Leone that "the clamp Texas is sending up has a tongue seal on it. We ordered it with packing. * * * The tongue seal won't work because we took a quarter of an inch off of it." Leone said, "wait until it comes in and see what happens." Later, the next day, Jenkins similarly informed branch manager Spencer "that the clamp Texas is sending has a tongue seal on it. * * * It won't work. * * * We ordered it with packing and we took a quarter of an inch off that tongue, and there is no way that tongue will seal it." Spencer replied, " * * * it's already been made and it's on its way. We will have to see what happens."

On Saturday June 11, the clamp arrived from Texas. As Jenkins testified, "it was a tongue seal clamp with no packing." The two employees took the clamp to the ECI job and attempted for over 12 hours "to get this clamp to work"; however, "it didn't work." Paver then told foreman Leone,

> We can't get it sealed. We have tried everything we could think of. It's not the way we ordered it. I don't know what to say. We just can't get it stopped.

Leone responded: "Don't worry about it. Everybody makes mistakes."

On Monday June 13, Company superintendent Randolph summoned employees Jenkins and Paver into branch manager Spencer's office. Spencer was not there. Randolph informed the two employees that "we can't have * * * big mistakes like that and Al [Spencer] and I [Randolph] talked it over and decided to let you two go." Jenkins argued that Randolph had made "many mistakes" and had not been fired. Randolph responded, "that's the way it is." Previously, Jenkins had never received a reprimand or any criticism of his work. See General Counsel's Exhibits 5 and 6, the Company's progress reports issued to Jenkins on May 3 and June 13, 1977, respectively.

Employee Paver similarly testified that after examining the leak at the ECI job on June 6, he stated to Jenkins, "why don't we put a tongue in and use it to tongue the gap" and also use a "packing seal." Jenkins agreed. Paver had ordered about four or five clamps with "packing" in the past; however, as Paver acknowledged,

> * * * I never asked for a clamp made this way because usually when I come up to a job and look at a flange it might be mismatched. I never saw a weld on a flange like that. * * * The way I understood it, it was my job to look at it and see what to do with it.

Paver then called in his order to Texas. Paver, as he further testified, told the Texas representative on the

telephone that he had a DS 100 sheet — a data supply sheet (General Counsel's Exhibit 8) — and,

> we started from the top of the sheet and we'd go down giving the information that we had.

Paver recalled:

> When we got to the gap, I gave him this 3-½ [inch] measurement. And he says, "Where did you get this 3-½? What did you use to measure this?" I said, "my veneers. I will explain this to you in a moment." And I went down and explained this obstruction.

Paver, after explaining the obstruction to the Texas representative on the telephone, stated: "I would like to go with packing on this." Paver was then asked, "Where do you come up with this 3-½? What did you use to measure?" Paver responded:

> "I used my veneer. I didn't want to use a tongue as a [seal]." He [the Texas representative] said, "What is this packing. I don't understand." Then, I explained the weld again. And he said, "Well, all right." He goes, "I'll see what we can do with it." And he hung up and I hung up.[5]

Thereafter, as Paver further testified, on Saturday June 11, Paver and Jenkins picked up the clamp for the ECI job. Paver observed, "This isn't going to work" — there was no "packing" on the clamp and "it wasn't quite wide enough." In brief, the tongue was cut to a 3½ inch gap as ordered; however, without the packing, it was too

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[5] The data sheet which was filled out by the employees at the ECI job (General Counsel's Exhibit 8) states under "instructions for field":

* * *

> ¼ of in from gap on flange 2 (¾ inch wide and ¼ weld high) (packing).

* * *

Paver recalled that he "turned [the data sheet] in" at the Alsip office after leaving the ECI Job.

narrow to hold in the seal. Repeated efforts to install the clamp and seal the leak were unsuccessful. Foreman Leone later visited the ECI job. Paver explained to Leone that "they didn't make the clamp the way I asked them to." Leone responded: "Don't worry about it. Just go order another clamp." Paver also reported the incident to branch manager Spencer on the telephone. Spencer agreed that a new clamp should be ordered.

Paver recalled that on Monday June 13, Jenkins and he were summarily terminated by Randolph. Paver acknowledged that he had been instructed by management to fill out the data sheet forms accurately and that the ECI data sheet form shows the "gap" at 3.5 inches instead of 3.75 inches.[6]

Employee Gazelle testified that he spoke with manager Spencer on June 13 in Spencer's office. Co-worker Paul Durham was also present. Gazelle and Durham then asked Spencer why Jenkins and Paver were fired. Gazelle asked, "how come Milton [Jenkins] was fired. He's just an assistant. He doesn't have any final say-so in the measuring of a clamp. That's the technician's final decision on what he feels is the best way to seal it." Spencer replied:

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[6] Paver also explained that during his last period of employment with the Company (February 14 through June 13, 1977), he had not been reprimanded or warned by the Employer about his work. (See General Counsel's Exhibit 11, Paver's progress report dated May 31, 1977.) In addition, Paver acknowledged that he had been terminated by former Company manager Bill Buchardt in June 1976 "because I left the job leaking." Paver explained the incident. Later, Buchardt was fired by the Company and manager Spencer then rehired Paver. Paver was then told: "If you want, you got the job because we [Spencer and Steve Stewart] know you got the shaft."

> he [Spencer] had talked to Texas, and when Texas asked who the assistant on the job was, and he had told him Milt Jenkins, he said get rid of him too.

Spencer assured Gazelle and Durham: "Don't worry. Nobody else will be fired on account of this." Gazelle acknowledged that he had in the past incorrectly measured a clamp; the clamp did not fit; and he was not fired or repremanded for his mistake. Gazelle also noted that in late 1976 he had ordered a clamp with a tingue and packing seal and Texas "agreed." Gazelle, however, accurately recorded the "gap" for this "tongue and packing seal" clamp.

Employee Durham testified that he was at the ECI job on Saturday June 11. Durham witnessed co-worker Paver explain to foreman Leone "that the clamp they were working on wouldn't fit." Leone assured Paver: "Don't worry about it. We all make mistakes." Later, Leone stated to Durham:

> he [Leone] had just called Al Spencer. Leone told me [Durham] that Al Spencer had said not to worry about it. Tell Larry not to worry about it. Just take another set of measurements and send them to Texas so we can get a clamp.

Durham also witnessed Leone relate this information to Paver. "Spencer said not to worry about it. Just take another set of measurements and get it to Texas." And, Durham recalled that Spencer later assured Gazelle and himself: "Don't worry about it. Nobody else will be fired for the same thing."

Branch manager Spencer testified that on Saturday June 11, he received a telephone call from foreman Leone concerning the ECI job. Leone then informed Spencer that Paver had admitted that "he [Paver] had things to do that night and had cut a quarter inch off to make the job easier * * *." Spencer then told Leone to have Paver "in the office Monday morning." Spencer further testified that he received a telephone call from Paver that same day. Spencer recalled:

> He [Paver] called me up and told me the clamp didn't fit. Basically that it was his fault. Can't remember the exact words now. He admitted it was his fault and asked me what I was going to do. I don't remember if he asked me whether I was going to fire him or not. I said, "We are not going to do anything right now."

Spencer, as he further testified, telephoned vice president Harrison on Sunday June 12 and apprised Harrison that a technician and his assistant had "cut one quarter inch off a [tongue] of a clamp to make the job easier for themselves and that the clamp did not fit." Harrison assertedly left the "decision" as to "what * * * to do" to Spencer. Spencer claimed that he did not mention the names of the employees involved to Harrison. Spencer subsequently telephoned superintendent Randolph during late sunday and

> told him [Randolph] I [Spencer] wasn't going to be in the office Monday morning, * * * I wanted him to discharge Mr. Paver and Mr. Jenkins.

Spencer assertedly terminated both Paver and Jenkins because "they were not employed as engineers and they designed this clamp themselves in the field which is not their job * * *." Spencer acknowledged that clamps have been "mismeasured" by employees in the past and the employees involved were not terminated by the Company.

Company vice president Harrison recalled his conversation with Spencer on Sunday June 12. According to Harrison, Spencer then told Harrison that two employees had "mismeasured" a clamp; the "clamp doesn't fit" and "the technician said they did it on purpose." Harrison responded that "we can't tolerate that." Harrison further testified in part:

> After * * * I [Harrison] told him [Spencer] to get rid of them, * * * [he] said, "It's Larry Paver and Milt Jenkins." I said, "we can't help it; with this Union talk.

• • •

"With this Union talk, can we do that."

• • •

I said, "Al, if there is a good reason regardless who it is, it's my feeling that something should be done. And we cannot tolerate this."

Harrison added:

I said, "well you know what has to be done." That's before I knew who the individuals were.

Superintendent Randolph acknowledged that some ten employees have made mistakes in measuring clamps; most of the clamps could not be used; and none of the employees involved were discharged. Randolph further acknowledged that he had seen the data sheet prepared by Paver and Jenkins for the ECI clamp "prior to the installation of the clamp."

Foreman Leone claimed that on Saturday June 11, employee Paver made the following admission to him:

"Well, I [Paver] had a few things to do today, and I didn't feel like working on this all day long; so when the measurements came in, I took a quarter inch off the measurements."

According to Leone, Jenkins also admitted that he "knew of the situation." Jenkins assertedly stated to Leone:

"who am I [Jenkins] to override a technician. I am the assistant tech."

Leone later spoke with Spencer. Leone denied that either Jenkins or Paver had told him prior to Saturday June 11 that they had reason to believe that the ECI clamp would not seal the leak. Leone also denied that on June 11 Paver had said that the clamp was "not the way we ordered it." Leone, however, could not "remember" saying

to Paver on June 11: "* * * don't worry about it, we all make mistakes." Further, Leone did not know when the initial ECI clamp had been ordered by Paver and Jenkins. Leone agreed that on the day when this clamp was ordered, there was no way of determining exactly when the clamp would be delivered from Texas.

Robert Thompson, an officer of Respondent, explained that it is the engineering personnel in the Texas office who "have the ultimate decision to decide how the job should be done. It is not decided in the field" and the "most critical responsibility" of a field technician is "to make accurate measurements." Thompson claimed that the cost of the new ECI clamp was about $3700.

William C. Grace, employed by the Company as a supervisor of engineering in its Texas office, testified that Respondent's Exhibit 2 (sheet 4) is the data sheet which he prepared for the ECI clamp in question on June 7, 1977. According to Grace, "I am the one who took the call and filled it out." Grace claimed that no request had been made for an "unusual sort of clamp." Grace, in any event, would not have approved any request by a technician for a "special clamp" here. However, General Counsel's Exhibit 8, the data sheet report of Paver and Jenkins, indicates that this order was made on June 6 and not on June 7, as stated in Grace's report. Further, Grace, after being shown General Counsel's Exhibit 8, testified in part:

> I recall a discussion with the technician in regards to obstruction, and the request for packing, and I explained to him there — with the obstruction, the flange clamp, the tongue clamp would be better because of the kind of close on the packing. This is not the exact words, but the discussion.
>
> * * *
>
> Well, sir, we discussed the data, and he explained the obstruction, the weld, and I remember we discussed packing, and we discussed the weld in trying to close on the packing. We discussed that it would

be better to go with the flange clamp because of the gap, no mismatch, and it's easier just to machine the flange to the counter bore larger to get over the weld.

I credit the testimony of employees Jenkins, Paver, Gazelle and Durham as detailed *supra*. Their testimony is in significant part mutually corroborative. Their testimony is also substantiated by testimony of vice president Thompson, vice president Harrison, branch manager Spencer, superintendent Randolph, foreman Leone and supervisor Grace. And, relying upon the demeanor of the witnesses, I am persuaded on this record that employees Jenkins Paver, Gazelle and Durham have given a complete and credible account of the above sequence of events. Insofar as the testimony of Thompon, Harrison, Spencer, Randolph Leone and Grace differs with the above testimony of Jenkins, Paver, Gazelle and Durham, I find the testimony of the latter to be more complete, accurate and trustworthy. In particular, as discussed below. I am persuaded here that Spencer, Randolph, Harrison and Thompson threatened the employees with a shutdown of operations at Alsip and with other reprisals if the employees exercised their rights to union representation. Further, as discussed below, I am persuaded here that the real reason for the summary discharge of employees Paver and Jenkins on Monday June 13 was their unionization activities. I do not credit foreman Leone's assertion that Paver admitted to him on Saturday June 11 that he, Paver, "had a few things to do today, and didn't feel like working on this all day long, so when the measurements came in [Paver] took a quarter inch off * ** ." Indeed, Leone acknowledged that neither Paver nor Jenkins could have known on the day they made their measurements, Monday June 6, when the clamp in fact would be delivered to the job site. Instead, I am persuaded here that Management has seized upon this error on the part of the two employees as an excuse to discharge them and thereby discourage employee organizational activities at the Alsip facility.

## Discussion

Respondent argues that it discharged employees Jenkins and Paver solely for lawful reasons. The question presented is whether Respondent, in discharging the two employees on June 13, 1977, was motivated by an unlawful purpose. For, under settled law, "the Board is not compelled to accept the Employer's statement" of the reason for an employees' discharge "when there is reasonable cause for believing that the ground put forward by the Employer was not the true one, and that the real reason was the Employer's dissatisfaction with the employee's" union or protected, concerned activities. *Great Atlantic and Pacific Tea Co.* v. *N.L.R.B.*, 354 F.2d 707, 709 (C.A. 5, 1966). And, a discharge motivated only in part by an unlawful purpose is similarly illegal. *J. P. Stevens & Co.* v. *N.L.R.B.*, 380 F.2d 292, 300 (C.A. 2, 1967), cert. den. 389 U.S. 1005.

On the credited evidence of record as recited *supra*, I find and conclude that Respondent, in summarily firing employees Jenkins and Paver on June 13, 1977, was motivated at least in part by their union and related protected concerted activities. Thus, Jenkins and Paver were the chief union protagonists at the Alsip facility. They had arranged for a meeting of their co-workers to prepare a list of "gripes." They had attempted to secure the assistance of a union in their organizational efforts. Jenkins had apprised branch manager Spencer about the employees' "list of gripes" and that "we'd like to talk with the [Company's] representative from Texas about our gripes and about the shop going union." Branch manager Spencer thereafter repeatedly warned the employees: " * * * if you guys push this union thing, Texas will end up shutting this shop down * * *." Superintendent Randolph similarly warned the employees that vice president Harrison "is coming to meet with you guys" and "if you push this union thing * * * Texas will shut this shop down." Indeed, branch manager Spencer admonished em-

ployee Gazelle: " • • • they will transfer all salaried people, lay everybody on hourly off and shut the office down • • •. Texas doesn't want unionists in the Company. • • • I don't want to see you guys doing anything you'd be sorry for later • • •." Subsequently, Spencer again warned Gazelle "as a friend" not to get "involved in this union thing • • •." Spencer made it clear to Gazelle, " • • • you've got a good chance to move up • • • I don't want to see you fuck it up • • •." And, on or about June 3, Company vice president Harrison, in discussing employee Jenkins' list of "gripes" at the Alsip shop, confirmed to the assembled employees that "they'd probably shut [the facility] down" if the employees chose union representation. Thereafter, about June 10, Company vice president Thompson also warned the assembled Alsip employees that " • • • if this shop did go union, you could see how it would not run efficiently as it should and, therefore, yes, we probably would have to shut it down."

On the following Monday morning, June 13, employees Jenkins and Paver were fired by superintendent Randolph because, as foreman Leone wrote on the employees' progress reports (General Counsel's Exhibits 4 and 6):

> At this time, a mistake that was uncalled for and that never should have been, a ¼ inch subtraction off a tongue clamp.
>
> • • •
>
> Larry [Paver] was doing a fine job as a tech, but when it came down to the end, he knew he was wrong in what he had done, but too late to change.
>
> • • •
>
> At this time, Milt [Jenkins] had gone along with a tech to subtract ¼ inch off the width of a tongue clamp which caused a misfit.
>
> • • •
>
> Milt [Jenkins] would have made a good tech, but we felt that Milt should have spoke up at the time knowing this was not the right thing to do.

* * *

In the past, some ten Alsip employees had made mistakes in measuring piping for clamps. In some cases, the clamps could not be used. Nevertheless, Management had not discharged or apparently even reprimanded the employees involved.

It is true, as Respondent claims, that employees Paver and Jenkins made a mistake at the ECI job. They made, in my view, a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation. However, assessed in the context of Management's strong opposition to the employees' union and related protected concerted efforts, the willingness of Management to tolerate mistakes in the past, the good work records of these two employees, and the timing of their terminations, I find and conclude that the real reason for their discharges was their union and related protected concerted activities. I find and conclude that Management seized upon this mistake as an excuse to deter and chill the unionization and related protected concerted activities at the Alsip shop. Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Further, I find and conclude that branch manager Spencer's and superintendent Randolph's warnings to the employees to the effect that, "if you push this union thing * * * Texas will shut this shop down," plainly tended to impede employee Section 7 activities and therefore violated Section 8(a)(1) of the Act. In like vein, vice president Harrison's and vice president Thompson's warnings to the Alsip employees to the effect that, " * * * we probably would have to shut it down" if the employees chose union representation, were proscribed threats of reprisal. These statements by upper Management were not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control * * *."

See, *e.g., N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 575, 616-620 (1969).[7] Finally, branch manager Spencer's warning to employee Gazelle that the Employer would transfer and lay off employees if they persisted in this unionization effort and Spencer's related admonishment to the employee not "to get involved" because "you'd be sorry" or jeopardize "a good chance to move up," also tended to inhibit employee organizational activities, in violation of Section 8(a)(1) of the Act.

I find and conclude that Respondent, by the foregoing conduct, violated Section 8(a)(1) and (3) of the Act as alleged.

## Conclusions Of Law

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by threatening its employees with layoff, plant closure, loss of promotion and other reprisals if they chose union representation.

3. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Vincent Lawrence Paver and Milton Louis Jenkins, and thereafter refusing to reinstate them, because they had engaged in union and related protected concerted activities.

4. The unfair labor practices found herein effect commerce within the meaning of Section 2(6) and (7) of the Act.

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[7] And see, *Surprenant Mfg. Co.* v. *N.L.R.B.,* 341 F.2d 756, 761 (C.A. 6, 1965); *N.L.R.B.* v. *Miller,* 341 F.2d 870, 873 (C.A. 2, 1965); *Int'l Union of Electrical Workers* v. *N.L.R.B.,* 289 F.2d 757, 763 (C.A.D.C., 1960); *N.L.R.B.* v. *Kolmar Laboratories, Inc.,* 387 F.2d 833, 836-838 (C.A. 7, 1967); *N.L.R.B.* v. *Louisiana Mfg. Co.,* 374 F.2d 696, 702-703 (C.A. 8, 1967).

## Remedy

Having found that Respondent engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. And, as the unfair labor practices committed by the Respondent strike at the very core of employee rights safeguarded by the Act, I recommend that Respondent cease and desist from in any other manner infringing upon rights guaranteed employees in Section 7 of the Act.

It has been found that Respondent, in violation of Section 8(a)(3) and (1) of the Act, unlawfully terminated employees Paver and Jenkins on June 13, 1977. It will therefore be recommended that Respondent offer to both employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of their unlawful terminations, by payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[8] Further, it will be recommended that Respondent preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due and the rights of reinstatement under the terms of these recommendations. Respondent will also be directed to post the attached notice.

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[8] See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

## ORDER[9]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record of the case, Respondent Leak Repairs Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with layoff, plant closure, loss of promotion and other reprisals if they chose union representation;

(b) Discouraging membership in any labor organization by discriminatorily discharging any of its employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or conditions of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer employees Vincent Lawrence Paver and Milton Louis Jenkins immediate and full reinstatement to their former jobs or to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in this Decision;

(b) Preserve and make available to the Board or its agents all payroll and other records, as set forth in this Decision;

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[9] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.46 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its offices and facility in Alsip, Illinois, copies of the notice attached hereto as "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 13, shall after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Decision what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 24, 1978.

/s/ Frank H. Itkin
Administrative Law Judge

Form NLRB—4727
(9—69)

NOTICE TO EMPLOYEES

Posted by order of the National Labor Ralations Board

An agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that LEAKS REPAIRS, INC., has violated the National Labor Relations Act and has ordered us to post this notice. We therefore notify you that:

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[10] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

WE WILL NOT threaten our employees with layoff, plant closure, loss of promotion or other reprisals if they chose union representation.

WE WILL NOT discourage membership in any labor organization by discriminatorily discharging any of our employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer VINCENT LAWRENCE PAVER and MILTON LOUIS JENKINS immediate and full reinstatement to their former jobs or to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings, as provided in the Board's Decision and Order.

LEAK REPAIRS, INC.
(Employer)

Dated: ..... By: .....
(Representative (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Bldg., 219 S Dearborn Street, Chicago, Illinois 60604 (Tel. No. [312] 353-7597).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued April 3, 1980)

May 21, 1980

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

No. 79-1678

vs.

LEAK REPAIRS, INC.,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

ORDER

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order finding that the respondent, Leak Repairs, Inc., violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) by threatening its employees with plant closure, layoff, loss of promotion, and other reprisals if they chose union representation. The Board further found that the respondent violated Sections 8(a)(1) and (3) of the Act by discharging employees Vincent Paver and Milton Jenkins because of their union activities. The Board's order required, *inter alia,* that the respondent cease and desist from the unfair labor practices found and affirmatively required the respondent to reinstate the discharged employees. For the reasons set forth below, the petition for enforcement is granted.

I

The respondent does not contest the Board's finding that it committed an unfair labor practice under Section 8(a)(1) of the Act by threatening its employees with certain sanctions if they chose union representation. Accordingly, the Board is entitled to summary enforcement with respect to this finding. *See, e.g., Dreis & Srump Mfg. Co., Inc.* v. *N.L.R.B.*, 544 F.2d 320, 325 (1976).

II

Respondent does challenge the Board's finding that it violated Sections 8(a)(1) and (3) of the Act in discharging employees Paver and Jenkins for their union activities on the ground that they were discharged for cause and not on the basis of an impermissible discriminatory motive. Respondent concedes that the discharge of Paver and Jenkins violated Sections 8(a)(1) and (3) of the Act if it was motivated even in part by antiunion considerations. Respondent contends, however, that a legitimate reason existed for their discharges—their failure to report the accurate measurements for the refinery leak. Consequently, it argues the burden rests with the Board to establish that the discharges would not have resulted from that purportedly legitimate basis alone. This Court has never endorsed such a "but for" test, *Chicago Magnesium Castings Co.* v. *N.L.R.B.*, 612 F.2d 1028, 1034 (7th Cir. 1980), and we find the cases cited by respondent in support of such a standard to be inapposite. Rather, the standard adopted by this Court focuses on the controlling issue under Section 8(a)(3): the actual motivation for the discharge in question. *W.W. Grainger, Inc.* v. *N.L.R.B.*, 582 F.2d 1118, 1120 (7th Cir. 1978). Thus, where substantial evidence supports the Board's finding that a discharge was motivated —even in part—by antiunion considerations, the mere assertion that a "legitimate reason" for the discharge "exists" is not enough; the employer must demonntrate that the discharge in question was "predicated solely on

these grounds and not by a desire to discourage protected activity'' *Jays Foods, Inc.* v. *N.L.R.B.*, 573 F.2d 438, 443 (7th Cir. 1978), cert. denied, 439 U.S. 259 (1978), quoting *N.L.R.B. v. Fairview Hospital,* 443 F.2d 1217, 1219 (7th Cir. 1971).

The central inquiry here is one of fact: whether the discharges of Paver and Jenkins were motivated by antiunion conniderations. *N.L.R.B.* v. *Gogin,* 575 F.2d 596, 601 (7th Cir. 1978). That inquiry is properly charged, in the first instance, to the Board, and, where there is substantial record support for the Board's finding, the reviewing court "may not displace the Board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it *de novo.*'' *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 (1951); *Electri-Flex Co.* v. *N.L.R.B.*, 570 F.2d 1327, 1331 (7th Cir. 1978). Applying the principles cited above to the facts of this case, we conclude that there is substantial evidence on the record as a whole to support the finding of the Board that the discharges of Paver and Jenkins were discriminatorily motivated.

III

The record reveals that Paver and Jenkins were the principal union protagonists at the respondent's facility in Alsip, Illinois. During April and May 1977, they actively promoted unionization among their fellow employees, attempted to enlist the organizational assistance of local unions, and arranged a meeting at which they and other employees compiled a list of grievances and discussed the prospects for unionization. Thereafter, Paver and Jenkins openly discussed their union support with the manager of the Alsip facility and repeatedly requested that management meet with a union representative to discuss employee grievances. Subsequently, on June 3, 1977 the respondent sent a management representative from its corporate headquarters in Texas to meet with the Alsip employees. At that meeting, Jenkins acted

as the spokesman for the employees, served the management representative with a list of the employees' grievances, defended the notion of union representation and again urged management to meet with a union representative. On Monday, June 6, 1977, Paver and Jenkins were sent to Engineering Cooperative, Inc., a nearby refinery, to repair a leaking heat exchanger. Upon inspection of the leak, Paver and Jenkins determined that an improvised clamping apparatus would correct the problem and telephoned appropriate specifications for such a clamp to the respondents' engineering department at its Texas facility. On Friday, June 10, 1977, another management representative met with the employees of the Alsip facility and Jenkins again pressed for the respondent's position regarding unionization. The next day, Saturday, the clamp which had been ordered for the refinery leak arrived. Upon inspection, Paver and Jenkins discovered that a packing component was missing from the order, but nevertheless, attempted, without success after twelve hours, to install the clamp. They informed their foreman and manager of the Alsip facility of the situation and were advised to simply order another clamp. The following Monday morning, without prior warning, Paver and Jenkins were summariy discharged from employment.

As the Board found, this precipitous action—coming, as it did, shortly after the respondent became aware of their outspoken prounion sentiments—provides strong support for the Board's finding of antiunion discrimination, for "'[t]he abruptness of a discharge and its timing are persuasive evidence as to motivation.'" *N.L.R.B.* v. *Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971), *quoting N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), *cert. denied*, 355 U.S. 829 (1957). Moreover, the record amply demonstrates, and the respondent concedes, the existence of antiunion animus on the part of its management personnel. Once apprised of employee interest in union representation, these officials repeatedly threatened Paver, Jenkins and the other em-

ployees of its Alsip facility with plant closure and other reprisals in order to blunt their organizational thrust. These threats—and the antiunion attitude they manifest—were "properly and highly significant factors" for the Board to evaluate in determining that the discharges were motivated by the respondent's opposition to unionization. *N.L.R.B.* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971).

Finally, the failure of the respondent's explanation for the discharge to withstand scrutiny itself supports the Board's finding. The respondent contends here, as it did before the Board, that the discharges were justified because Paver and Jenkins admitted at the hearing before the Administrative Law Judge that they had knowingly relayed an incorrect measurement for the clamp to the respondent's engineers in Texas. However, it is far from clear that such a mistake—even if actually known at the date of discharge to have been deliberate—would have resulted in the loss of employment, particularly in light of their exemplary work records. It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation." But, as the Board noted, the respondent had never discharged any other employee for making mistakes; indeed, shortly after the discharge of Paver and Jenkins, the manager of the Alsip facility assured employees Gazelle and Durham that "[n]obody else will be fired for the same thing." These facts, as well as the conflicting accounts of the discharges given by the respondent's witnesses which were descredited by the Board, provide strong support for the Board's finding that antiunion considerations—and not the problems with the clamp—moved the respondent to discharge Paver and Jenkins. *N.L.R.B.* v. *Henry Colder Co.*, 416 F.2d 750, 753 (7th Cir. 1969).

Accordingly, the Board's determination that the respondent "seized upon this mistake as an excuse to deter and

chill the unionization activities'' at its Alsip facility was clearly warranted. We therefore conclude that the Board's finding that the respondent violated Sections 8(a)(1) and (3) of the Act in discharging Paver and Jenkins is supported by substantial record evidence. The petition for enforcement is granted and the Clerk of this Court is directed to enter an appropriate decree.

Enforced.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LEAK REPAIRS, INC.,
Respondent.

No. 79-1678

JUDGMENT

Before: Cummings, Sprecher and Bauer, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against Respondent, Leak Repairs, Inc., its officers, agents, successors and assigns on March 20, 1979. The Court heard argument of respective counsel on April 3, 1980, and has considered the briefs and transcript of the record filed in this cause. On May 21, 1980, the Court being fully advised in the premises, handed down its order granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Leak Repairs, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

/s/ William J. Bauer
Judge, United States Court of Appeals for the Seventh Circuit